

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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KEVIN MCCABE,

Plaintiff,

vs.

RAMPARTS, INC., d/b/a/ LUXOR
HOTEL AND CASINO aka
LUXOR-LAS VEGAS,

Defendant.

2:08-CV-01232-PMP-GWF

ORDER

Before the Court for consideration are Defendant's Motion in Limine [No. 9] to Exclude Speculative Testimony by Plaintiff's Expert Witnesses (Doc. #202), Defendant's Motion in Limine [No. 10] to Exclude Testimony and Opinions of Plaintiff's Expert Witnesses on Issues of Law (Doc. #203), and Plaintiff's Motion in Limine [No. 11] to Exclude Certain Opinions by Michael Oostman (Doc. #149). Each of the foregoing motions is fully briefed.

On July 9 and 10, 2012, the Court conducted an evidentiary hearing to consider the admissibility of testimony by various expert witnesses tendered by Plaintiff and Defendant in accord with *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993) and Fed. R. Evid. 702 and 703.

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1 Four of the experts tendered by Plaintiff at the *Daubert Hearing* are
2 proffered as pool safety experts from the perspective of pool design and construction
3 (David Morrill), safety engineering and human factors (David Thompson, Ph.D.),
4 aquatic safety and aquatic risk management (Shawn DeRosa), and safety in
5 connection with the construction and operation of swimming pools and amusement
6 and water parks (Charles Haines). The sole pool safety expert tendered Defendant at
7 the *Daubert Hearing* was Michael Oostman, an aquatic safety consultant.

8 Based upon their experience, training, or education, each of the proposed
9 expert witnesses tendered by the parties possess expert knowledge relating to pool
10 safety, particularly as it relates to the adequacy and location of pool safety warning
11 signs and pool depth markings, as well as the training and supervision of swimming
12 pool lifeguards. It is with respect to these limited areas that the Court finds expert
13 testimony may be helpful to the trier of fact to understand the evidence or to
14 determine a fact in issue relating to Plaintiff's negligence claim. Defendant's
15 proposed pool safety expert, Michael Oostman, possesses demonstrable
16 qualifications in each of these areas and will be permitted to testify at trial as an
17 expert witness on behalf of Defendant subject to appropriate objections to questions
18 which call for testimony from Mr. Oostman that is either beyond the scope of his
19 expertise or otherwise inadmissible.

20 Similarly, the four expert witnesses proposed by Plaintiff also have
21 demonstrated their expertise, but the Court finds that they are redundant and
22 cumulative with respect to the areas of inquiry that the Court finds may be helpful to
23 the trier of fact. With the exception of the proposed testimony of Shawn DeRosa
24 regarding the training, placement and supervision of swimming pool life guards, all
25 four experts tendered by Plaintiff overlap significantly with respect to their testimony
26 concerning the adequacy of swimming pool warning and safety signs,


1 and pool depth marking. The Court finds it appropriate to permit Plaintiff to call
2 Shawn DeRosa to counter Defendant's expert Michael Oostman on the subject of the
3 training, placement and supervision of lifeguards. However, simply because, as
4 argued by Plaintiff, the testimony of each of Plaintiff's proposed four experts
5 concerning the adequacy of pool safety warning signs and pool depth markers is
6 offered from the perspective of their particular fields of expertise, does not alter the
7 fact that it is unnecessarily and impermissibly commutative and hence more
8 prejudicial than helpful to the trier of fact on these issues. As a result, the Court will
9 limit Plaintiff to one (1) expert witness for purposes of offering testimony on the
10 subjects of pool safety warning signs and pool depth markers. Plaintiff may select
11 the expert witness he wishes to offer in this regard at trial, and shall designate that
12 person in writing at least thirty (30) days prior to the commencement of trial.

13 Based upon the foregoing, and good cause appearing,

14 **IT IS ORDERED** that Plaintiff's Motion in Limine [No. 11] to Exclude
15 Certain Opinions by Michael Oostman (Doc. #149) is **DENIED**.

16 **IT IS FURTHER ORDERED** that Defendant's Motions in Limine [No. 9
17 & No.10] to Exclude Expert Opinion Testimony (Docs. # 202 & #203) are
18 **GRANTED** to the limited extent provided above and **DENIED** in all other respects.

19 DATED: July 13, 2012.

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22 PHILIP M. PRO
23 United States District Judge
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